IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16817 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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PATEL GANESHBHAI KHUSHALDAS

Versus

PATEL BECHARBHAI MADHAVLAL

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Appearance:

1. Special Civil Application No. 16817 of 2003

MR PK JANI for Petitioner No. 1

MS KJ BRAHMBHATT for Respondent No. 1

..... for Respondent No. 1/1-5

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 05/12/2003

ORAL JUDGEMENT

1. Heard ld. counsel Mr. Unwala for ld. counsel

Mr.P.K. Jani for the petitioner and ld. counsel Ms. K.J. Brahmbhatt appearing on caveat for the respondent.

2. The order passed by ld. Civil Judge (S.D.) in Special Civil Suit No. 145/1998 while dealing with the application exh.208 preferred by the original defendant under O.6 R.17 of Civil Procedure Code (CPC for short) to amend the pleading by inserting proposed amendment in the written statement as para-32-A, rejecting the said application, is challenged in this petition by invoking jurisdiction of this Court under Articles 226 & 227 of the Constitution of India.

3. Undisputedly, the petitioner was consistent on the date on which his written statement was filed that he is one of the co-owners of the property referred to by the plaintiff in the suit while resisting the claim of the plaintiff. However, by seeking amendment, the plaintiff has prayed that he may be permitted to raise a plea that at least he should be declared as an owner as he has acquired the title of the property in question by way of adverse possession. It is contended that the agricultural land in question is in his possession since last more than 50 years and he is enjoying it as an owner continuously and peacefully which is known to everybody.

4. It is rightly argued by ld. counsel Ms. Brahmbhatt that the plea which the defendant intends to raise is inconsistent with the stand taken by him in the written statement and ld. trial Judge has rightly rejected the application by not permitting the defendant to raise such an inconsistent plea and that too at a belated stage of the trial.

5. Undisputedly, the plaintiff has stepped into the witness box and he has examined himself. Amendment if permitted, may cause serious prejudice to the case of the plaintiff and may also protract the trial. The order passed by ld. trial Judge rejecting the application is in the background of the amended CPC as applicable on the relevant date i.e. 14.10.2003 and said provisions have been looked into while appreciating the stand of the defendant.

6. While developing the arguments on behalf of the petitioner, ld. counsel Mr. Unwala appearing for ld. counsel Mr.P.K.Jani for the petitioner has placed reliance on three decisions. Firstly, he has placed reliance on the decision in the case of (M/s) Jawarmal Ramkaran v/s M/s Pari Keshavlal Jamnadas, reported in 1989(2) GLH P.388, wherein the Court has observed as under:-

> "while considering the question of amendment in the written statement by which the party seeking

amendment is trying to rectify an error the only question that should be put is : "Is the amendment likely to cause injury to the other side ?".If yes, can it not be compensated by awarding costs ? Moreover, if the other side is likely to be put to inconvenience, on account of having closed its evidence, it may further be asked, "Is it not possible to remove this inconvenience by permitting the other side to recall the winesses already examined ? ....."

Referring to abovesaid observations, Mr. Unwala has argued that to do the substantive justice, the trial Judge ought to have allowed the amendment and at least this Court should allow the amendment by imposing costs and an opportunity to the plaintiff so if he desires, he can lead further evidence as his right to lead evidence is still open.

7. The another decision relied upon by ld. counsel Mr. Unwala for the petitioner is the decision of the Allahabad High Court in the case of Satish Chandra Saxena and others v/s Krishna Prasad Saxena and another, reported in AIR 1989 All 34, wherein Allahabad High Court has observed that amendment also can be allowed where a party is seeking deletion of a particular plea and thereafter claiming ownership of the property i.e. land in question by way of adverse possession. The trial Court in the cited case had refused the amendment application, but Allahabad High Court allowed the Revision Application preferred under Sec.115 of CPC against the said order and granted the amendment as prayed.

8. The third decision on which Mr. Unwala has placed reliance is of Punjab & Haryana High Court in the case of Gulwant Kaur v/s Mohinder Singh and others, reported in AIR 1972 P & H P.260. In the said decision, the defendant claimed ownership on the ground that the house viz. property in question was gifted to her and that she was in possession of the house as a owner from that particular date of gift. Pending trial, the defendant filed an application under O.6 R.17 of CPC seeking amendment that if it is not proved that she is owner, then it be held that she has become absolute owner by adverse possession as she was in continuous possession of the property in question from that particular date of gift.

9. I have carefully considered proposed para-32A sought to be inserted in the written statement by the defendant. I have also considered the decisions cited by ld. counsel Mr.Unawala. It is true that with a view to do the substantive justice, amendment can be allowed at any stage and that is the spirit of O.6 R.17 of CPC.

However, the ld. trial Judge, while dealing with the application exh.208, has considered all relevant aspects and the basic plea taken by the present petitioner. Even while praying for amendment, he has not stated that "if it is accepted that the plaintiff is the absolute owner of the property in question, in that situation, he- the defendant has acquired ownership by way of adverse possession. It seems that by continuing with the main plea that he is the co-owner of the property, is simultaneously claiming acquisition of the ownership by adverse possession- a better status than of a co-owner. Such amendment and that too at a belated stage inconsistent with the main plea if is not allowed by the ld. trial Judge, it can not be said that the order passed by the ld. trial Judge is in any way illegal or perverse. The ld. Judge is supposed to consider the prevailing law on the day on which the application for amendment was moved. It is rightly argued that embargo introduced in R.17 of O.6 of CPC can not be ignored and ld. trial Judge has rightly not ignored. It is not necessary for the Court to refer or quote the law in the order mentioning it specifically while dealing with such interlocutary application. The ld. Judge is supposed to keep the law in mind-set when he is asked to deal with any such type of dispute/point pending trial. The procedural law are mostly directory and not mandatory in nature. Merely because the scheme of O.6 R.17 of CPC is of directory nature, it can not be said that any jurisdictional error or patent illegality has been committed by the trial Court.

10. In view of above and in view of the reasons assigned by the ld. trial Judge while rejecting the application exh.208 and for the reasons aforesaid, I am inclined to hold that this is not a case wherein the powers of superintendence requires to be exercised, even if the arguments of ld. counsel Mr. Unwala is accepted that if this application is allowed, no prejudice would be caused to the petitioner or if caused, could have been taken care of by this Court in view of the ratio propounded by the High Court in the case of M/s Jawarmal Ramkaran (supra). This submission is found acceptable. Hence, there is no substance in this petition and the same is hereby dismissed in limine. This Court could have awarded costs, but in view of the request made by ld. counsel Mr. Unwala for the petitioner, no formal order of costs is passed.

[ C.K. BUCH, J ]

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